

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARVIN F. PFANNENSTIEL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 140,795
<b>DODGE HOUSE RESTAURANT</b>	)	
Respondent	)	
AND	)	
	)	
<b>DODSON INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant requested review of the Order dated July 15, 1996, entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on February 4, 1997.

**APPEARANCES**

Steven M. Tilton of Topeka, Kansas, appeared for the claimant. Terry J. Malone of Dodge City, Kansas, appeared for the respondent and its insurance carrier. Jeff K. Cooper of Topeka, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Order.

### ISSUES

In an earlier review and modification proceeding, by Order dated October 13, 1993, claimant was awarded a 77 percent permanent partial general disability. Claimant brought this proceeding to review that award. The Administrative Law Judge denied the request to modify the 1993 Order, and also ordered claimant to pay the court reporters' fees and denied the request for an award of attorney fees. The only issues before the Appeals Board on this review are: (1) whether claimant's award should be modified, (2) whether claimant should pay the court reporter's fees, and (3) whether claimant's attorney is entitled to an award for attorney fees.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Order denying modification of claimant's award should be affirmed.

(1) Claimant injured his back on January 24, 1988, and was originally awarded permanent partial general disability benefits for a 13 percent whole body functional impairment. After the original award was entered, claimant underwent back surgery and sought review and modification of the award. Upon review and modification, claimant was awarded permanent partial general disability benefits for a 77 percent work disability which was affirmed by the Appeals Board by Order dated December 20, 1993. That work disability finding was based upon the opinions of expert witness Jerry D. Hardin regarding claimant's loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage. At the time of the first review and modification award, claimant's whole body functional impairment rating had also increased from the original 13 percent to 40 percent.

Claimant initiated this second review and modification proceeding and requested an award for permanent total disability benefits. The Administrative Law Judge denied claimant's request, and claimant requested this review.

After carefully considering claimant's arguments, the Appeals Board finds that claimant has failed to prove that either his impairment or disability is any greater now than when he was awarded the 77 percent permanent partial general disability. On the other hand, based upon the present status of the record, it is arguable that both claimant's functional impairment and disability are now somewhat less than what they were at the time of the first review and modification proceeding. That observation is based upon the testimony of Howard L. Wilcox, Jr., M.D., the only physician to testify about claimant's present physical condition. Both Dr. Wilcox's functional impairment rating and medical restrictions indicate claimant is better now than at the time of the first review and modification proceeding.

When considering the entire record, claimant has failed to prove a detrimental change in medical condition, functional impairment rating, medical restrictions, ability to perform work in the open labor market, or ability to earn a comparable wage.

Based upon the above, the Appeals Board finds that claimant has failed to prove he has increased impairment or disability for which he would be entitled to modification of his award.

(2) The Administrative Law Judge assessed the court reporters' fees to claimant. Under K.S.A. 44-555, the Administrative Law Judge is empowered to assess the reporter's fees to any party. Considering the almost complete lack of evidence of a changed condition or changed circumstances resulting in greater disability, the Appeals Board is reluctant to modify the Administrative Law Judge's assessment of costs. Therefore, when considering the facts and circumstances surrounding this proceeding, the Appeals Board also finds that claimant should pay the court reporters' fees.

(3) When determining a reasonable attorney fee, the Administrative Law Judge considered the lack of evidence to support claimant's request for review and modification and determined that a reasonable fee would be nothing. Again, for the same reasons expressed above, the Appeals Board is very reluctant to modify the Administrative Law Judge's finding that claimant's attorney should not recover a fee for the time expended in this review and modification proceeding. Considering factors such as the nature of the proceeding, lack of evidence supporting the claim, the amount of compensation involved and the results obtained, among others, the Appeals Board also finds that a reasonable attorney fee is zero dollars.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order dated July 15, 1996, entered by Administrative Law Judge Jon L. Frobish should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven M. Tilton, Topeka, KS  
Terry J. Malone, Dodge City, KS  
Jeff K. Cooper, Topeka, KS  
Office of Administrative Law Judge, Garden City, KS  
Philip S. Harness, Director